



NATIVE HAWAIIAN LEGAL CORPORATION

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YEARS OF
SERVICE TO
THE COMMUNITY
1974 - 1999

November 22, 1999

To: Assistant Secretary M. John Berry
c/o Document Management Staff
Department of the Interior
1849 C Street, N.W., Mailstop 7229
Washington, D.C. 20240 (FAX: 202-208-3230)

RE: RECONCILIATION WITH NATIVE HAWAIIANS

Enclosed is a draft of testimony which I would like to present on December 10, 1999. It is only a draft, and the actual testimony presented will be a modified, shorter version.

Sincerely,

Mahealani Kamaau
Executive Director

Services made possible with major funding from the Office of Hawaiian Affairs.

Nihoa. Upright, straight, stately, tall and straight as a tree without branches; sharply peaked, as mountains. Fig., righteous, correct.



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WORKING AS ADVOCATES WITHIN NATIVE HAWAIIAN COMMUNITIES: THE SPIRIT OF KINSHIP

by Mahealani Kamaau

Introduction

Ka Po'e Hawai'i, the Hawaiian people, are the original inhabitants of the island archipelago, Hawai'i. Archaeological evidence establish their presence in the islands at least 2,000 years ago. Hawaiian oral traditions passed on through chants, legends, myths and mo'oku'auhau, or genealogies, trace their origin to early Polynesian ancestors and beyond them to the life forces of nature itself.

Hawaiians are inseparable from nature. The unity of humans, nature and gods forms the core of traditional Hawaiian philosophy and spiritual belief. In Hawaiian, the term which expresses this fundamental relationship is Lokahi (Unity). Related are Aloha 'Aina (Love the Land) and Malama 'Aina (Care for and Protect the Land).

Hawaiian Communities are 'Ohana

Today, native organizations often call themselves 'ohana, meaning "family" or "extended family". 'Oha, the root or corm of the taro plant, is not only the "staff of life" in the Hawaiian diet, but it is closely linked with the origin of the people. Legend tells that the progenitor of the Hawaiians was a mystic man-and-taro named Haloa.

With Hawaiians, family consciousness of the same "root of origin" is a deeply felt, unifying force, no matter how many offshoots come from offshoots. The core of the 'ohana are the living pili koko (blood relatives). However, non-related persons can be admitted to 'ohana status. When a family member dies, he remains -- as a spirit -- very much a part of the 'ohana.

In traditional times, Hawaiian communities consisting of 'ohana shared land and resources. Between and among 'ohana there was continuous, ongoing giving and exchange of food, utilitarian articles, and services -- not in barter, but as voluntary giving. The 'ohana constituted the community within which economic life moved. The 'ohana maintained communal stewardship over the land, ocean and all of the natural resources of the islands. No one owned or claimed to own the land or resources.

The introduction of a chiefly system around 1100 A.D. disrupted, but did not fundamentally alter, the role and "rootedness" of 'ohana. Today, Hawaiians still strongly identify with kinship relationships based upon 'one hanau, the "sands of one's birth". The ritual of chanting family genealogy and birthplace in introducing oneself has given way to less formal protocol in modern times. When working with indigenous Hawaiian communities, however, it is very important to appreciate the singular importance of kinship and place to the Hawaiian sensibility.

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Molo. Upright, straight, stately, tall and straight as a tree without branches; sharply peaked, as mountains. Fig., righteous, correct.

Loss of Hawaiian Land; Loss of Hawaiian Sovereignty

The concept of private ownership of land had no place in early Hawaiian thought. Within the Hawaiian hierarchical structure, the high chief had ultimate power, but it was not without limits. The chief's authority was not personal authority; it was a power channeled through him by the gods. In relation to land and natural resources, he was analogous to a trustee. This trust concept continued throughout the political hierarchy and was reinforced by reciprocal rights and obligations of each strata of society. Although the people owed a work obligation to those above them in the societal structure, they could freely move to other areas if treated unfairly.

The 1778 arrival of Captain James Cook ushered in an era which completely altered socio-economic patterns as Hawai'i became a major refreshment stop for European vessels sailing the Pacific and a major supplier of the sandalwood trade. Within a very short time, the economy turned from one primarily aimed at subsistence to one enmeshed in international trade. The Hawaiian people's condition declined as Western diseases destroyed much of the population and traditional notions of responsibility were disrupted.

Land tenure patterns reflected and served this new economy. Westerners entered Hawai'i's land usage patterns as foreign settlers were "given" lands by the chiefs in return for services or merely out of traditional Hawaiian generosity. After overharvesting collapsed the sandalwood trade, Westerners with substantial capital accumulated in that trade began large-scale plantations on the islands.

Soon, disputes over land rights developed between the chiefs and the foreigners. In these disputes, the foreign community had distinct advantages. Foreign gunboats frequently came to Hawai'i to enforce the merchant's point of view. Westerners also assumed many of the most important positions and thus were able to influence government decisions. Native Hawaiians came to fear foreign accumulation of land. By 1845, the land tenure system could neither maintain itself in the face of a hostile foreign world nor accommodate itself to the wishes of that world.

Hawaiian chiefs came to believe that fee ownership would protect native land from foreigners, because these foreigners had laws which respected private property. The chiefs enacted the Great Mahele (division) of 1848, a law by which all of Hawai'i's lands were privately vested in the King, the Chiefs, the Government, and the People. Six years later, the People owned less than one percent of the land. In the next 50 years, nearly three-fourths of the total land base passed into foreign ownership and control. This was accomplished by purchase, long-term leases, and a coup d'etat by American sugar interests.

Coincident with the 100th anniversary of the coup d'etat, the U.S. Congress in 1993 apologized for the illegal Overthrow and taking of Hawaiian lands (Public Law 103-150). To date, however, there has been no restitution. In July, 1996 the Hawaiian Sovereignty Elections Council conducted a mail-out referendum asking the question, "Shall the Hawaiian people elect delegates to propose a Native Hawaiian government?" 22,294 voters, or 73.28% of ballots cast voted for the proposition. As a result, the private non-profit organization, Ha Hawai'i, conducted an election of 85 delegates to a Native Hawaiian Convention ('Aha Hawai'i 'Oiwi) in January of 1999. The delegates are presently conducting community education and other outreach in order to prepare their constituents for the restoration of a sovereign nation.

Working with 'Ohana to Save Kuleana (Ancestral Lands) from Adverse Possession

Wailuku, Maui – About 200 members of the Oponui 'ohana shyly take seats in the room usually reserved for the Maui County Council. They have received special permission to meet here with their lawyers. Their family is one of hundreds named in a Quiet Title lawsuit filed by Rosewood Hotels, a Texas corporation. The family has made the long, winding trip over tortuous Hana "Highway" to attend a Wailuku court hearing earlier that day. Some speak Hawaiian only. Several are white-haired kupuna (elders). Most don't understand what happened in court. They fear they will lose their land.

For the last century, Hawaiian families have been losing ancestral lands in Quiet Title Actions through adverse possession. Adverse possession has enabled large, typically corporate, landowners without paper title to establish legitimate claims based upon open, hostile, continuous occupation of another's land. While ostensibly serving the public purpose of turning "abandoned" land into productive land, the doctrine of adverse possession has been used by the powerful and well-heeled to claim native kuleana landholdings. Proving "abandonment" has become a forced, contrived, legalistic ploy played out in the courtrooms to the great disadvantage of impoverished Hawaiians. With the smallest land area of all states in the nation, adverse possession in Hawai'i is inimical to an indigenous culture that relies so heavily on land-related resources for its survival. For over a century, the practice has been rampant and notorious in native communities. Among Hawaiians, adverse possession is called "aihue", legalized "theft". In 1991, Hawaii's State Legislature passed House Concurrent Resolution No. 145, which included the following language:

"Native Hawaiians have lost and are losing legitimate land claims and rights associated with these [adverse possession] claims;

"There are increasingly more claims on Native Hawaiian lands for purposes of speculation and resale which puts the land economically out of the reach of the Native Hawaiian;

"Most Native Hawaiian lands are in 'undivided interests' and are susceptible to expensive adversarial Quiet Title Actions;

"Most Native Hawaiians do not have the economic means to properly defend their aboriginal claims in a formal court".

The Resolution urged that a study be completed to rectify the problems cited. Over the past several years, the problem has only gotten worse.

Land titles in Hawai'i originate in the Great Mahele of 1848 (see Page 1) and laws adopted immediately thereafter. At first, only Hawaiians could own land. An 1850 law, however, later allowed any resident, regardless of citizenship, to own and convey land.

Another law, the Kuleana Act of 1850 specifically allowed native families to make fee simple claims to kuleana, small parcels of land (one to four acres) upon which they were already living and growing food. Of Hawaii's 4 million acres, kuleana claims totalled only 28,600 acres. Tragically, the majority of Hawaiians did not complete the kuleana claims process and lost their rights to continued occupancy upon

ancestral lands (see Page 5, Pai 'Ohana v. United States of America).

No one knows how many kuleana parcels are still held by Hawaiian families, but there is a strong commitment to protecting these lands from adverse possession claims. Until NHLC was established, indigent Hawaiians were not represented in complex Quiet Title cases. Kuleana were routinely defaulted and lost to monied corporate plaintiffs.

Working with families like the Oponui 'Ohana for the past 16 years, NHLC has made a substantial difference in the way these cases are litigated.

Advances have been made in the way rules of evidence are applied. Kama'aina witness testimony--sworn oral testimony of Hawaiian elders--is now liberally admissible. Rules of construction and interpretation of legal documents written in the native language comport more precisely with authentic native usage.

There have been advances in procedural due process, including stricter notice requirements. In one case, the Plaintiff had to prove, with supporting documentation, its efforts to notify Hawaiian families of the lawsuit filed against them. It was not enough to publish a legal notice in the newspaper. Kuleana no longer default automatically to corporate plaintiffs or escheat to the state. Instead, because of their special status as traditional landholdings, they are held in trust by the Office of Hawaiian Affairs for Native Hawaiian beneficiaries.

Over the past 19 years, thousands of families who could not otherwise afford an attorney have been represented in complicated Quiet Title litigation, drawing upon NHLC's native attorneys, title searchers, genealogists, and translators.

To educate the community about their rights, NHLC has published The Native Hawaiian Rights Handbook, a definitive text accessible to lay individuals and also used to teach a Hawaiian Rights law school course. It has also published The Legal Land Terms Dictionary, a lexicon of terms used in Hawaiian legal and conveyance documents. Since most land titles in Hawaii are traceable to the Great Mahele of 1848 when all legal documents were written in the native language, the Dictionary has become an invaluable resource for the community as well as attorneys and other professionals.

During the five-year period 1987-1991, 179 Quiet Title lawsuits involving 7,416 acres of land were filed. Only two of these actions did not name Hawaiian families as defendants. Considering the one-acre average size of kuleana, a substantial number of Hawaiian families were affected over that five-year period.

Working with 'Ohana to Preserve Aboriginal Title: Pai 'Ohana v. United States of America

Malani Pai and his 'ohana have lived along the shores of the Ai'opio fish trap (traditional aquaculture fishpond) which encompasses the southeastern boundary of the Kaloko-Honokohau National Historic Park, Island of Hawai'i, since prior to the Great Mahele of 1848.

NHLC traced the Pai family's occupation of the lands surrounding the fish trap through detailed archival research and oral history. As a result, the Federal District Court found that the family had used and occupied their ancestral lands from well before the turn of the century.

Judge Ezra ultimately held that despite their historic occupancy, the Pai family did not have a legal right to remain on their ancestral lands. The Court of Appeals for the Ninth Circuit affirmed the judge's ruling upon the grounds that their ancestors did not apply for a land patent when the Hawaiian government in 1850 allowed native tenants living on the land to apply for fee title to their houselots and gardens (see Page 4, Kuleana Act of 1850). The Pai family continued to use and occupy their land, notwithstanding posted eviction notices by the National Park Service and State Board of Land & Natural Resources.

NHLC helped the family organize and coordinate a team of legal experts, Hawaiian elders, archivists, and lobbyists, in an effort to keep the Pai family -- who are among the dwindling numbers of Hawaiian families who continue to live on ancestral lands in the traditional way, from dispossession. On March 28, 1996, the Pai 'Ohana was joined by 400 supporters poised to resist eviction when an agreement was negotiated by NHLC lawyers with the National Parks Service and State Board of Land & Natural Resources. The agreement temporarily forestalled eviction, which was to take place April 1, until "all sides develop a framework for future negotiations." Negotiations occurred subsequent to the agreement but ultimately, the Pai 'Ohana decided they could not accede to certain federal and state conditions, which compromised their sovereign status. As a result, the Pai 'Ohana's tenure and status on their ancestral lands is not recognized by the state or federal governments.

Working with Communities for Sane Development: Lanaians for Sensible Growth

During the Hawaiian territorial period, 98% of the Island of Lana'i was sold by politicians to powerful business interests. The island was soon transformed into a major pineapple plantation, and a monolithic economy evolved. The Lana'i community was dominated by economic and political forces exerted by Dole Foods and its predecessors. Residents both revered the Company while fearing its oppressive influences in many important facets of their lives.

In 1972, the Company began discussions about introducing tourism to the Island to balance the pineapple economy and generate more income. These plans lay dormant until the mid-1980's, when a new owner accelerated development of a two-hotel resort plan under a vision of providing ultra-luxury accommodations that were supposed to be inflation and recession-proof investments. He secured land use approvals for these hotel developments on the premise that it would help diversify the economic base of Lana'i and reduce its dependence upon pineapple.

The new owner and his plans were viewed by residents as authoritarian and paternalistic; however, no one openly opposed his development plans. In this atmosphere, residents founded Lanaians for Sensible Growth (LSG), to serve as a counterbalancing force to the stranglehold the Company had exerted over its employees and families for decades. LSG vigorously opposed the Company's plans and forced the alteration of others.

The Native Hawaiian Legal Corporation stepped in where others would not, to provide LSG legal assistance in dealing with the myriad of land use regulations that was supposed to guide the developments

planned by the Company. In this process, NHLC worked with Lana'i residents to intervene before the Maui County Planning Commission when the Company sought a Special Management Area Permit for the Manele Hotel. With NHLC's assistance, the residents settled that controversy by reaching an agreement with the Company to keep access and community use of the Island's premier beach open. In that agreement, the Company agreed to a governance structure that included Island residents in the management of the beach park. This was an unprecedented step for the Company.

Subsequently, the Company sought approvals to add two golf courses and two luxury home developments to the two hotels already built. Lana'i residents, once again assisted by NHLC, challenged this new direction because of concerns over erosion, degradation of pristine coastal waters, and use of the limited potable water supply for golf course and landscape irrigation. This time, NHLC assisted in the negotiation of an agreement in which the Company agreed to stay away from the sole source of potable water for the Island in exchange for approval of the golf course proposals.

The Company subsequently broke that promise, leading to enforcement proceedings before the State Land Use Commission. NHLC continued to represent the residents in those proceedings as well as in contested case hearings on whether to allow for construction of luxury homes in pristine coastal areas.

NHLC was successful in obtaining a reversal of the Land Use Commission's approval of the luxury home project and is still representing Lana'i residents in the enforcement proceedings. The Commission concluded the Company had violated the terms of its permit. The Lana'i community has been able to forestall the use of precious limited drinking water for golf course and landscape irrigation. Its successful appeal stopped construction of 176 acres of ocean front property that would have led to severe environmental and water supply problems for the entire Island.

In its negotiated agreement, the Lana'i Community Development Corporation was created as a community-based initiative to diversify the island's economy. NHLC's work with the Lana'i community continues.

Wai'anae Community Concerns Coalition **west Beach, O'ahu**

The Ko 'Olina resort, a development nearly equal in size to the entire resort area of Waikiki, was constructed on O'ahu's leeward coast in the mid-1980's next to one of the largest native communities in the islands. Community opposition was vehement, but the development, which had been on the drawing boards for decades, moved inexorably forward. Concerns included disturbance and desecration of burial sites, preservation of sacred sites and degradation of shoreline fishing grounds. NHLC assisted the community with these issues for over a decade, employing legal as well as community organizing strategies. The community ultimately negotiated a settlement which provided for mitigation of some of its harsher impacts. A community-based economic development project also received start-up funds. Today, aquaculture provides food and income to many Wai'anae families. NHLC continues to monitor compliance with the settlement agreement and recently negotiated additional shoreline access for subsistence fishing.

The Fishing Village of Miloli'i, Hawai'i

NHLC represented the families of Miloli'i, considered the last Hawaiian fishing village, who sought

to protect their fishing grounds against construction of a five-star luxury resort with a 400-slip marina. The residents of Miloli'i have depended upon the fishery resource for their subsistence since ancient times. Although the developer received approval for his project from the State Land Use Commission, NHLC was able to vacate that decision in court. The decision preserved the fishing resource for the people of Miloli'i.

**Working to Protect Water Resources:
The Waiahole-Waikane Community Association
and the Hakipu'u 'Ohana**

The availability of taro, a staple food of indigenous Hawaiians and of native people throughout Polynesia, has declined dramatically, in part due to wholesale diversion of streams and traditional water sources by large commercial landowners. These diversions have also had catastrophic impacts upon fish, crustaceans and seaweed that are an important part of the indigenous diet. This has occurred even though native Hawaiians have important water rights under Hawai'i law. Unfortunately, government officials have done little to enforce these laws or safeguard precious water resources for many decades.

Native Hawaiian farmers in Waiahole, O'ahu asked NHLC for help with restoring minimum instream flows to the streams in Waiahole. For many decades, the Waiahole Irrigation Company had diverted Waiahole water utilizing an intricate system of tunnels built with immigrant labor during the early 1900's through the Ko'olau Mountain range.

Native farmers along the windward coast of O'ahu lost their water, and struggled for decades against overwhelming odds to grow taro and other staple crops. Now that sugar is phasing out, commercial landowners are hard-pressed to justify the large, disproportionate water allocations formerly enjoyed.

As a result, a complex, protracted legal battle was waged in a series of contested case hearings. After nearly a century, water was restored to the streams on an interim basis pending final outcome of the hearings. The Water Commission rendered its decision, in favor of an approximate 50-50 allocation between windward farmers and leeward commercial interests. The state of Hawai'i has since acquired the Waiahole Ditch, and NHLC the state on behalf of windward farmers, charging that the state has placed windward farmers at a disadvantage by improperly applying water allocation criteria.

**Working with 'Ohana to Protect Water Resources:
Community Education**

In connection with work on behalf of the Waiahole-Waikane Community and Hakipu'u 'Ohana, NHLC has held educational forums and undertaken a comprehensive review of the Hawai'i Water Code. In connection with and through participation on a Commission, NHLC met with 52 community groups and agencies to strengthen Hawaiians' capacity to obtain water for the cultivation of taro, and the propagation of fish, crustaceans and seaweed that are an important part of the indigenous diet. A second major water allocation issue has been the lack of water for Hawaiian Homes trust lands (see following section, Hawaiian Homelands Program).

These community meetings played a critical role in educating many in the indigenous community

who were not familiar with their rights and the problems relating to enforcement. NHLC prepared and disseminated a report which had a tremendous impact on raising awareness of indigenous water rights.

Working with 'Ohana to Preserve Trust Lands: Hawaiian Homelands Trust

Seventy-five years ago, 203,000 acres of land were set aside by Congress for indigenous homesteading to "rehabilitate" a dying race. Most of that land remains unsettled and today, native people are 40% of Hawai'i's homeless.

In 1995, the State of Hawai'i entered into a \$600 million settlement after decades of mismanagement and abuse of the Hawaiian Homelands Program. Thousands of beneficiaries had been denied settlement on their trust lands. Thousands of acres had been illegally expropriated and sold while under both federal and state management.

Native Hawaiian Legal Corporation played a major role in bringing about this historic settlement. It was accomplished after nearly two decades of litigation, lobbying government officials, and working with Native Hawaiian communities.

NHLC itself was founded 24 years ago by aggrieved beneficiaries of the Hawaiian Homelands Trust, and over the years has assisted hundreds of native families who suffered harm as a result of political self-dealing, bureaucratic mismanagement, and illegal transfers of trust lands.

In 1991, the Hawai'i Advisory Committee to the United States Commission on Civil Rights issued a report which reiterated what NHLC had held forth in the community for many years.

"A Broken Trust, The Hawaiian Homelands Program: Seventy Years of Failure of the Federal and State Governments to Protect the Civil Rights of Native Hawaiians", included the following findings:

1. That the United States failed to exercise its trust obligations to the beneficiaries of the Hawaiian Homes Commission Act, as mandated by Section 5(f) of the Hawai'i Admission Act;
2. That unlike other Native Americans, Hawaiians never received the privileges of a political relationship with the United States. Yet Hawaiians, whose former kingdom was a member of the international community of nations and recognized by the United States, have a compelling case for federal recognition. The lack of formal recognition by the Federal Government has resulted in their inability to secure control of lands and natural resources, develop self-governance mechanisms, enjoy eligibility for Federal programs designed to assist Native Americans and other protected groups, and the denial of valuable legal rights to sue for discrimination;
3. That with questionable legal authority and negligible compensation, the Federal Government occupied valuable Hawaiian Homelands for purposes unrelated to fulfillment of the trust;
4. That Native Hawaiian beneficiaries were denied the explicit right to sue for enforcement of the trust in Federal court under the Hawai'i Admission Act and the Hawaiian Homes Commission Act;

5. That the United States failed to provide funding support or sustained technical assistance for implementation of the Hawaiian Homes Commission Act;

6. That an accurate inventory of the Hawaiian homelands had never been achieved;

7. That although the State of Hawai'i amended its constitution in 1978 to provide full funding of the Hawaiian Homelands program, the Department received less than 0.2 percent of the State's overall budget, and was therefore still exceedingly dependent on revenues generated by leasing homestead lands to non-beneficiaries;

8. That Native Hawaiian Rights to gather, hunt and fish for subsistence purposes, and to have access to sacred places of worship on Hawaiian Home Lands had been insufficiently protected by the State of Hawai'i.

NHLC played a critical role in developing the state's settlement process, having filed a suit to force inclusion of an independent representative for trust beneficiaries on the Governor's Task Force determining damages relief. NHLC assisted the independent representative in organizing consultations with the community, and participated actively in working with the independent representative to formulate positions before the Task Force.

Finally, NHLC was active in consultations with the community as well as hearings and discussions at the Legislature which finally resulted in adoption of a measure authorizing the \$600 million settlement to be paid in increments of \$30 million annually for 20 years.

These steps addressed major issues that would have otherwise taken decades to get through the court system and brought closure to issues that have plagued the program since Statehood in 1959. The additional resources will be a major boost in settling 17,000 native Hawaiian families, some of whom have been waiting over 30 years for homesteads.

Working with 'Ohana to Protect Trust Lands: Individual Beneficiary Claims

The historic settlement took care of illegal trust land conveyances, but did not address nearly 5,000 damage claims filed by individual beneficiaries through a separate claims process. In 1997, Governor Cayetano opposed the process and together with the state legislature passed a bill that resulted in the formation of a Working Group to establish a "formula and any criteria necessary to qualify and resolve claims". The Working Group was composed of state officials who opposed the claimants during the Claims Review process and testified against the claimants during legislature hearings. Claimants were barred from having a representative sit on the Working Group.

In November of 1997, the Working Group forwarded its new criteria to Governor Cayetano, who accepted it. The new standards eliminated 60% of the claims that had been filed. The standards were to be applied retroactively, even to claimants who successfully proved their case before the Claims Panel and received favorable decisions.

In July, 1998, Circuit Court Judge Marie Milks issued a preliminary decision that found the establishment of the Working Group unconstitutional and in violation of claimants' right to due process.

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She reaffirmed that decision in December of 1998.

Despite their court losses, Governor Cayetano and the Attorney General submitted legislation to change the Claims process, using the same criteria drafted by the Working Group. The Legislature rejected the bill.

In May 1999, the Legislature passed H.B. 1675 which gave the Panel one more year to complete its work and formed a commission to seek alternative ways of compensating those claimants who received favorable decisions from the Panel. Governor Cayetano vetoed the bill, shutting down the claims process, and NHLC filed suit in federal district court to enjoin the state from enforcing a December 31, 1999 deadline to file claims with the state circuit courts. Further action is pending.

Working with 'Ohana to Protect Trust Lands: Ceded Lands Trust

Nearly two million acres were "ceded" by American annexationists to the U.S. government in 1898. The U.S. retained 400,000 acres for military installation and national parks and transferred the remaining 1.35 million acres to the new State of Hawai'i in 1959. These lands form a strong basis for outstanding indigenous Hawaiian claims against the federal and state governments. It is also felt that these lands will constitute the land base of the future sovereign government. Therefore, indigenous Hawaiians have sought to halt the sale, transfer, or other dispositions of ceded lands.

Working with 'Ohana to Protect Rights of Access, Fishing, Hunting and Gathering: Public Access Shoreline Hawai'i (PASH)

Tourism is Hawai'i's largest industry, and resort development has despoiled and cut off shoreline and forest areas once frequented by natives for subsistence purposes. Over the years, many native communities have struggled with developers over issues which have included protection of and access to ancient burial sites; protection of and access to sacred sites; protection of fishing grounds; access to shoreline areas for subsistence fishing; and access to forest areas to gather food and medicinal plants.

In 1992, the Hawai'i Supreme Court issued a landmark ruling which greatly expanded the rights of Hawaiians who seek to re-establish traditionally and customarily exercised activities. The court held that the exercise of Native Hawaiian subsistence activities may extend beyond traditional geographic boundaries, provided that such practice was traditionally and customarily exercised according to Hawaiian common law. A written decision is expected within the next few months.

The Hawai'i Supreme Court underlined Hawai'i's unique origins by breathing life into rights that people today long assumed were dead.

In the Public Access Shoreline Hawai'i (PASH) case, developer Nansay Hawai'i claimed that a formal recognition of the rights of Native Hawaiians resulted in an unconstitutional "taking" or deprivation of private property from landowners.

The Hawai'i Supreme Court, in a unanimous opinion, rejected that argument and recognized the

right of Native Hawaiians to gain access to land for traditional and customary purposes reserved by the Hawaiian government in 1848, when fee simple titles were first granted. The court noted that these rights have retained their viability despite a 147-year span since the Great Mahele of 1848 (see Page 2) and were in fact reaffirmed by all citizens of our state during the 1978 Constitutional Convention.

In Hawai'i, a landowner's rights has never included the absolute right to exclude Native Hawaiians from lands on which they conduct customary and traditional practices. The Justices of the Hawai'i Supreme Court were on solid ground in reaffirming that the "right to exclude" has never been part of Hawai'i property law to the same extent as elsewhere in the United States.

At the same time, the Hawai'i Supreme Court made it clear that it will protect claimed Hawaiian practices only where they are both "reasonable" and "traditional". As attorneys who have worked with Native Hawaiian communities, families and individuals for the past 24 years, NHLC holds out the hope that the Hawai'i Supreme Court's opinion will lift the stigma too long associated with Hawaiian traditional and cultural practices.

Working with the Ka'auamo 'Ohana and the Ke'anae-Wailuanui Community Association

NHLC assisted a Native Hawaiian community seeking access across privately-owned land in order to reach the shoreline to fish. The community had traditionally used this route of access, which was blocked by the new landowner. As a result of NHLC's advocacy, the community had its right of access restored.

Working with 'Ohana to Protect Kupuna

Na 'Iwi v. Dalton

Native Hawaiians believe ancestral 'iwi are sacred and possess mana, spiritual power. In ancient times, bones were kept, fed, and deified. Desecration of ancestral 'iwi by intrusive osteological examination is viewed as a reprehensible practice.

NHLC assisted Hui Malama i Na Kapuna o Hawai'i Nei, an organization whose specific purpose is the repatriation of all Native Hawaiian kupuna remains and associated funerary objects from museums worldwide to their ancestral resting places in Hawai'i. It filed suit against Bishop Museum and the United States Navy for conducting pathological testing of over 1500 Hawaiian skeletal remains unearthed at Mokapu, Kane'ohe, O'ahu. Hui Malama sought a determination on the standard of notice required to native Hawaiian groups before any inventory were prepared in the course of repatriation under the Native American Graves and Repatriation Act (NAGPRA).